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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 75 - 1690

T. M. "JIM" PARHAM, ET AL.,

Appellants,

— v. —

J. L. AND J. R., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE URBAN LAW INSTITUTE AS AMICUS CURIAE

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BRIEF FOR THE URBAN LAW INSTITUTE AS AMICUS CURIAE

MANNER OF FILING

This brief amicus curiae is filed by the Urban Law Institute with the written consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS

The Urban Law Institute was established in 1968 as a legal research and development project funded by the National Legal Services Corporation. The primary purpose of the Institute is to assist in providing more and improved legal services for the poor. The Institute believes that every person, rich or poor, is entitled to equal justice under law. The Institute is concerned with a wide range of legal problems which confront the unrepresented poor of this nation. In its capacity as legal counsel for the poor, the Institute utilizes the legal system in an attempt to solve a variety of problems through effective advocacy in a manner once reserved only for the economically secure of the United States.

Mental Health is a field having problems of particular concern to the Urban Law Institute. The Institute is presently involved in major litigation affecting the rights of the mentally disabled residents of Forest Haven, an institution operated by the District of Columbia. The disposition of the present case will have significant impact on Evans v. Washington no. 76-0293 (D.D.C.) and a wide range of other cases in which the Institute is currently involved. This amicus brief will address only the question of state action the Court directed the parties to brief in its May 31, 1977 order noting probable jurisdiction.

QUESTION PRESENTED

Whether, where the parents of a minor voluntarily place the minor in a state institution, there is sufficient "state action", including subsequent action by the state institution, to implicate the Due Process Clause of the Fourteenth Amendment?

ARGUMENT

I. THE SUMMARY COMMITMENT OF APPELLEES TO STATE MENTAL INSTITUTIONS AS AUTHORIZED BY GEORGIA CODE SECTION 88-503.1 OCCURRED UNDER COLOR OF STATE LAW THEREBY IMPLICATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. State Action Is Present Where Significant Governmental Interests Are Exercised By The Delegation Of State Power To Private Persons Who Along With The State Act With The Force Of Law.

The Fourteenth Amendment is designed to protect individuals from state action, whether overt or covert, which deprives them of fundamental rights. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). The manner in which the state may infuse its policies and interests into objectionable conduct may take differing forms:

> "a state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the [Fourteenth] Amendment extend to all action of the State. . . , whether it be action by one of these agencies or by another." Ex Parte Virginia, 100 U.S. 339, 347 (1879).

By focusing on the state's role in such conduct, this Court has developed an expansive body of state action law subjecting so-called private conduct to constitutional scrutiny.1/

1/ See Thompson, Piercing the Veil of State Action, 1977 WISCONSIN L. REV. 1. See also, Nerken, A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the "Civil Rights" Cases and State Action,

This expansive trend of decisions has been marked by the Court's reluctance to articulate a single state action formula. Rather, by a process of "sifting facts and weighing circumstances," the Court has sought to evaluate significant state policies and interests that intrude into private relationships and are reflected in particular conduct. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Reitman v. Mulkey, 387 U.S. 369 (1967).

The Court has been presented with the state action issue in a variety of factual situations. As a result, the Court has approached this issue in an equally varied manner. We submit, however, that these seemingly diverse approaches reflect differing emphases of a singular unifying theme:

> State action is present where significant governmental interests are exercised by the delegation of state power to private persons who along with the state act with the force of law.

This theme is apparent in each of the following approaches employed by the Court:

1. Private parties who are clothed with state authority and act with the force of law. United States v. Williams, 341 U.S. 97 (1950); United States v. Price, 383 U.S. 787 (1965); United States v. Guest, 383 U.S. 745 (1965); Griffin v. Maryland, 378 U.S. 130 (1964).

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2. Private parties whose conduct is subject to pervasive state regulation. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); Burton v. Wilmington Parking Authority, supra; Moose Lodge No. 107 v. Irvis supra; Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Nixon v. Condon, 286 U.S. 73 (1932); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

3. Private action encouraged or compelled by state law and reflecting current state policy. Reitman v. Mulkey supra; Adickes v. S. H. Kress & Company, 398 U.S. 144 (1970); Moose Lodge No. 107 v. Irvis, supra; Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. State of Louisiana, 373 U.S. 367 (1963); Robinson v. Florida, 378 U.S. 153 (1964); Nixon v. Condon, supra; McCabe v. Atchison, Topeka & Santa Fe R. Company, 235 U.S. 151 (1914); Evans v. Abney, 396 U.S. 435 (1970); Shelley v. Kraemer, 334 U.S. 1 (1948).

4. Private action taken with reliance on state law, custom or usage. Adickes v. Kress, supra; Evans v. Abney, supra.

5. Private action involving the performance of traditional public functions delegated to private individuals. Smith v. Allwright, Terry v. Adams, supra; Nixon v. Condon, supra; Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 502 (1946).

6. Governmental action placing monopoly power in the hands of private entities to promote state policies. Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Lanthrop v. Donahue, 367 U.S. 830 (1961);2/ cf. Steele v. Louisville & N. Ry., 323 U.S. 192 (1944); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

In essence, the Court has evaluated the pervasiveness of state intrusion into the quasi-private relationship and assessed the state interests reflected in the objectionable conduct. The Court's characterization of the state action issue in the foregoing cases demonstrates an attempt to identify particular state interests in variant circumstances. Thus, the linchpin of the Court's analysis, although expressed in differing forms, contains a principled view of state action. Where this principle is operative, state action exists.

A closer review of the major decisions finding particular private conduct subject to the constraints of the Fourteenth Amendment illustrates the applicability of this principle.

The existence of a comprehensive state election code reflecting a systematic promotion of the state's discriminatory voting policy was sufficient to support a finding of state action in Nixon v. Condon, Smith v. Allwright, and Terry v. Adams. In each case, the statute guaranteed that a private political party could determine the qualifications of its members and thereby prohibit Negroes from participating in state primaries or the party's electoral process. Thus, the party was able to employ the state election code to enforce the state's "whites only" voting policy.

Describing the state's intrusion into the structure of private political parties, the Court observed:

2/ See Lavoie v. Bigwood, 457 F.2d 713 (1st Cir. 1972), for the "monopoly" characterization of these Supreme Court cases.

". . .the statute here in controversy has attempted to confide authority to determine of its [Executive Committee's] own motion the requisites of party membership and in so doing to speak for the party as a whole." Nixon v. Condon, 286 U.S. at 85;

". . .the state [through its election code] endorses, adopts and enforces the discrimination against Negroes. . ." Smith v. Allwright, 321 U.S. at 664; and

"It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." Terry v. Adams, 345 U.S. at 469.3/

By legislating the relationship between a private political party and the electorate in such a way as

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3/ In Evans v. Newton, 382 U.S. 296 (1966) the Court found sufficient "state action" where a city, pursuant to a privately created trust, managed a park which had become a public facility. Mr. Justice Douglas enunciated the Court's rationale:

> ". . .when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. at 299.

to guarantee the party's unfettered discretion in determining the qualification of its members, the state: (1) governed the structure of private political parties, (2) delegated specific state functions to a private organization, and (3) enabled the private party to act with the force of law in promoting the state's discriminatory voting policy. Thus, all of the elements of the general state action principle coalesce in these cases.

State action has also been found in a series of cases concerning the regulation of private businesses affairs. In Peterson v. City of Greenville, 373 U.S. 244 (1963) and Lombard v. State of Louisiana, 373 U.S. 267 (1963), the Court dealt with municipal regulatory schemes 4/ governing the relationship between restaurant proprietors and their customers. The delineation of the manner in which restaurant service was to be provided manifested a distinct state policy favoring segregated eating facilities. As a direct result, restauranteurs structured their business operations so as to refuse service to Negroes. Such intensive control and impact established the prerequisites for state action.

The decision in Robinson v. Florida, 378 U.S. 153 (1964) further demonstrates the determinative impact of legislative policies on a particular private business relationship. In Robinson the municipal scheme only provided for segregated rest room facilities in restaurants. Relying on this enactment,

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4/ In Peterson, supra, a city ordinance established a detailed scheme for restaurant segregation. In Lombard, supra, the statements of public officials were held to be the legal equivalent of an ordinance determining the relationship between a restaurateur and his customers. 373 U.S. at 273.

restaurateurs enforced state policy by providing separate eating facilities for each race. By fashioning his business conduct in accord with the discriminatory policy, the restaurateur acted with the force of law.

In Reitman v. Mulkey, 387 U.S. 369 (1967), the United States Supreme Court reviewed a clause in the California Constitution which prohibited restrictions on an individual's right to sell or lease real property to whomever he chose. The Court affirmed decisions of the California Supreme Court5/ finding that the enactment of Proposition 14 6/ constituted significant state involvement in private real estate transactions.

In reaching its conclusion, this Court focused on two crucial points: (1) the state had adopted, as current policy, the right of private parties to discriminate in the sale or rental of real estate; (2) that private parties could now invoke state law to accomplish discrimination and were thereby encouraged to do so.

Assessing the ultimate effect or impact of Proposition 14, the Court concluded:

5/ Mulkey v. Reitman, 64 Cal. 2d 529, 413 P. 2d 825, 50 Cal. Rptr. 881 (1966); Prendergast v. Snyder, 64 Cal. 2d 877, 413 P. 2d 847, 50 Cal. Rptr. 903 (1966).

6/ Proposition 14, adopted as Article I, § 26 of the California Constitution provided that:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent

"The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources." 387 U.S. at 376, 377.

Thus, the state's intrusion into the private arena so permeated the transaction as to constitute state action.7/

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such property to such person or persons as he, in his absolute discretion chooses."

7/ See also McCabe v. Atchison, Topeka & Santa Fe R. Co., 235 U.S. 151 (1914), where a state statutory scheme governed the relationship between common carriers and their customers, including the physical construction of railroad cars, in such a way that it injected a state racial policy into the operation of the railroad; and, Adickes v. S.H. Kress & Co., 398 U.S. 144, 173-74 (1970), where the Court held that private parties who act with knowledge of and pursuant to state enforced "custom and usage" (42 U.S.C. §1983) act "under color of" law. As Mr. Justice Brennan stated, concurring in part and dissenting in part, "when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action." 398 U.S. at 203.

The Court's decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) is fully consistent with the state action principle enunciated herein. In Moose Lodge, the Court held that the mere existence of a liquor license did not involve the state in a private club's discriminatory guest or membership policies. The licensing provisions did not establish a regulated pattern of private conduct in the sale of liquor. Unlike the cases previously discussed, the legislative enactments in Moose Lodge in no way governed the discriminatory relationship between the club and the persons to whom it served liquor. Nor did the state in any way delegate its authority to the club in order to accomplish discrimination. The Court noted that a liquor license did not "in any way foster or encourage racial discrimination." 407 U.S. at 176, 177. Thus, the possession of a liquor license had no impact on the private conduct complained of, and could not serve as a basis for a finding of state action.8/

Although no state action was found on the facts presented in Moose Lodge, the Court did reaffirm the basic principle guiding its approach to the state action question. Specifically, the Court indicated that had the regulatory scheme governed a liquor licensee's course of dealing with minorities or promoted a state policy favoring discrimination, then state action would have been present:

8/ Likewise in Evans v. Abney, 396 U.S. 435 (1970) the statutes authorizing the formation of wills did not clearly promote an identifiable state interest favoring discrimination, nor was there any evidence that the testator was persuaded or induced by the statute to discriminate.

"There is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination." 407 U.S. at 175, 176.

This is the so-called "nexus" test. In other words, in order for there to be significant state involvement to constitute state action one must not only demonstrate the state's presence but that the state encourages or fosters the action complained of. We will now demonstrate the significant involvement of the State of Georgia in the commitment process of juveniles in state mental institutions.

B. The Application Of The Principle Of Delegating State Power To Private Persons Requires A Finding Of State Action in The Instant Case.

The foregoing analysis reveals that where significant state interests are implemented through the delegation of state power to private individuals, the resultant conduct has the force of law and is thus subject to constitutional scrutiny. An examination of Georgia's statutory scheme regarding the "voluntary" and summary commitment of juveniles by their parents to state mental institutions compels but one inescapable conclusion: the state is significantly involved in the loss of appellees' liberty and denial of procedural due process rights as to implicate the fourteenth amendment.

It is well established that state action may emenate from conduct of administrative and regulatory agencies as well as from judicial and legislative action. Moose Lodge v. Irvis, 407 U.S. 163 (1972). This Court requires a careful sifting of facts and weighing of circumstances to properly determine the role of the state. We will demonstrate significant state involvement by Georgia in the

summary commitment of juveniles upon application by parents under GA. CODE ANN. Section 88-503.1. The state's active and indisputable role in the institutionalization process challenged here will support our contention that state action is evident from the aggregate facts of this case.

The state of Georgia has a significant interest in the mental health of its citizens, both adults and juveniles. It operates a comprehensive statewide program of treatment services for mentally ill children and adults at great public expense. Under a comprehensive statutory scheme,9/ the Department of Human Resources operates eight regional in-patient hospital facilities. Out-patient services are rendered at approximately fifty community health centers. In fiscal year 1976, the state of Georgia spent $149,791,851 to provide mental health care for its citizens.10/

Pursuant to this statutory scheme, state mental health officials act in concert with parents to unconstitutionally deprive juveniles of their liberty. The state is the principal actor here. It has statutorily created a relationship between parent, child, and state official in the mental health commitment process. But for the direct involvement of the state, the unconstitutional acts complained of here could not have been accomplished. Moose Lodge v. Irvis supra at 176.

The operation of Section 88-503.1 authorizes the summary commitment of juveniles under the guise of

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9/ GA. CODE ANN. ch 88-5; 1969 Ga. Laws 505.

10/ State of Georgia Budget Report Fiscal Year 1977, Vol. I.

a "voluntary" admission procedure. Acting pursuant to power delegated by the statute, a parent may apply to institutionalize the juvenile at any time. This same statute authorizes state mental health officials to receive juveniles for observation and diagnosis upon application. Observation and diagnosis usually require about one week. The minimum stay, prescribed by law, is five days. There is no established maximum period of confinement. Throughout this critical period of evaluation the juvenile is under the total dominion and control of state mental health officials. He is confined to a regional hospital behind locked doors. Newly received juveniles are not segregated from those already committed. No less restrictive form of treatment than total commitment is provided. Georgia mental health officials, not parents, conduct the observation and diagnosis period required by the contested statute. It is the state that makes the sole determination where, and under what conditions, the juvenile will be committed. The state establishes commitment standards, administers diagnostic tests, and evaluates the performance of the juvenile. If the juvenile shows signs of mental illness, the state makes the ultimate decision, independent of the parents, to institutionalize the child. The state also designates the appropriate time and conditions of discharge.

Finally, the state may confine an individual committed under Section 88-503.1 until he is recovered or until it is determined that commitment is no longer necessary or desirable. Yet the state is powerless to release the juvenile in the absence of parents who are ready, willing, and able to take the child back into their home.

These provisions more than adequately demonstrate the active and direct role of the state in the chal-

lenged process. The contested statute unconstitutionally permits parents and state mental health officials to involuntarily commit juveniles to state mental hospitals under the guise of a "voluntary" procedure. In practice juveniles, committed under Section 88-503.1, have a right to leave the institution only when the state decides that release is appropriate.

Ultimately, the question in any state-action case is not whether a single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. Burton v. Wilmington Park Authority supra at 722-726. The aggregate facts and circumstances surrounding appellees commitment here compel a finding of state responsiblity in the instant case. The unconstitutional confinement is the direct result of the state's conduct. Pursuant to statutory authority, state mental health officials received appellees for observation and diagnosis and caused the resultant loss of liberty. The Constitution proscribes any state conduct which deprives a citizen of liberty without due process of law. The state of Georgia is responsible for the enactment and administration of a statutory scheme which permits:

(1) juveniles to be committed without a hearing
(2) juveniles to be institutionalized without initial or periodic considerations of placement in the least drastic environment necessary for treatment;
(3) juveniles, once confined, to be denied a hearing for the determination of an appropriate required time for discharge.

The state of Georgia is singularily responsible for the total absence of due process safeguards.

In United States v. Guest, 383 U.S. 745 (1966), this Court noted the fourteenth amendment protects individuals against state action. The involvement of the state need not be direct. It may be only one of several cooperative forces leading to the constitutional violation. Georgia cannot justly avoid responsibility for its direct involvement here. The legislature has enacted a comprehensive statute which, in concept and practice, vests in superintendents of state mental health hospitals unbridled power to commit so called emotionally disturbed children to state mental hospitals at least until their eighteenth birthday. The facts and circumstances that surround the adoption and operation of the challenged statute compel a finding of state responsiblity here. This Court must insist on Georgia's strict adherence to the due process requirements of the fourteenth amendment.

CONCLUSION

For the above-stated reasons the decision below should be affirmed.

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